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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-1509

PHILIP ABRAMO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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No.

PHILIP ABRAMO,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Philip Abramo prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit, entered on March 14, 1974, which affirmed a judgment of conviction previously entered against the petitioner in the United States District Court for the Southern District of New York.

Opinion Below

The Court of Appeals affirmed in an opinion dated March 14, 1974, *United States* v. *D'Amato,* — F.2d —. The opinion of the Court of Appeals is reproduced as Appendix A, hereto, *infra* (la *et seq.*).*

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* In this Petition, "—a" is a reference to the appendices annexed to this Petition. Appendix A is the opinion of the Court

[Footnote continued on following page]

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Court of Appeals was filed on March 14, 1974.

Questions Presented for Review

1. Was petitioner deprived of a fair trial and his right to secure the attendance of witnesses by the refusal of the trial court to compel the government to produce or reveal the identity of a paid, registered informant where:

   a) The informant was intricately involved in the transactions which formed the basis for the government's trial proof;

   b) The bulk of the government's trial proof consisted of alleged acts and declarations of an unavailable co-conspirator in the absence of petitioner, but in the joint presence of the informant and an undercover narcotics agent;

   c) Certain of the alleged statements made by the informant at a number of such meetings were repeated to the jury by the direct testimony of the narcotics agent;

   d) Portions of one such meeting, including statements of the informant, were tape recorded and played for the jury as part of the government's case.

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of Appeals. Appendix B contains the Constitutional and Statutory Provisions Involved.

References to the Appellants' Appendix, filed in the Court of Appeals, a copy of which will be docketed to this Court, are signified as follows: "A.—"

2. Should the trial court, at least, have convened an *in camera* hearing, as alternatively requested by the defense, to determine whether the informant possessed information which would have been of value to the defense?

3. Did the government fail to adduce sufficient evidence upon which petitioner could properly be convicted beyond a reasonable doubt as having been a knowing participant in the alleged conspiracy?

4. Has the Court of Appeals reduced the standards of proof in conspiracy cases below proper evidentiary and constitutional requirements by:

   a) permitting the declarations of a co-conspirator to be used for the purpose of determining whether a defendant was a member of an alleged conspiracy;

   b) permitting the concepts of "verbal act" and "statements against penal interest" to practically elminate traditional requirements of confrontation and cross-examination?

5. Was petitioner deprived of his right to a jury trial and were the jury qualification requirements of 28 U.S.C. § 1865 violated by the refusal of the trial court to declare a mistrial when, in the midst of deliberations, it was revealed that one of the jurors was a chronic claustrophobic who had suffered acute attacks of claustrophobia during deliberations, to the point of requiring temporary hospitalization?

Constitutional and Statutory Provisions Involved

This case involves the Due Process clause of the Fifth Amendment, as well as the Sixth Amendment rights of a defendant to an impartial jury, to be confronted with the

witnesses against him, and to have compulsory process for obtaining witnesses in his favor.

This case also involves the following provisions of the United States Code: 21 U.S.C. § 841(a)(1) and (b)(1)(A) [which prohibit possession of controlled substances with intent to distribute same], 21 U.S.C. § 846 [which prohibits attempt or conspiracy to commit a drug offense], and 28 U.S.C. § 1865 [which sets qualifications for jury service].

All of the above noted constitutional and statutory provisions are reproduced in Appendix B of this petition (14a, *et seq.*).

Statement of the Case

Introduction

Petitioner and two others, Frank D'Amato and Richard Zito, were named as defendants in a two count indictment filed in the Southern District of New York. The first count charged a conspiracy, commencing February 1, 1973, to possess and distribute heroin in violation of 21 U.S.C. § 846. The second count charged a sale of heroin to a Federal undercover agent on February 20, 1973, in violation of 21 U.S.C. § 841(a)(1).

A fourth individual, Frank Burdieri, was named as a conspirator. He met a violent death prior to indictment. The bulk of the trial proof concerned Burdieri's individual dealings and conversations with a Federal undercover agent and with a paid, registered informant of the Bureau of Narcotics and Dangerous Drugs (BNDD).

The three defendants were tried together before a jury. At the conclusion of the evidence, the trial Court dismissed the substantive (sale) count against petitioner, and the jury thereafter convicted petitioner as to the conspiracy charge.

The co-defendant D'Amato was convicted as to both counts. The co-defendant Zito was convicted as to the conspiracy. Due to the indisposition of a juror, the trial was terminated before the jury was able to reach a verdict as to the substantive charge against Zito.

Petitioner was sentenced to a term of seven years imprisonment, to be followed by three years of special parole, and was ordered to pay a fine of $15,000.

1. The Basic Facts*

Following three weeks of negotiations, one Frank Burdieri sold a half kilogram of heroin to an undercover team comprised of a paid, registered informant and a narcotics agent. For a few minutes about an hour prior to, and then immediately after the sale, Burdieri was observed to be in the company of Frank D'Amato and Richard Zito. This was the first time these two men were seen during the facts of this case. Zito never again appears in the facts. No one overheard the conversation among the three men and nothing was seen being transferred from D'Amato or Zito to Burdieri. However, following the sale, D'Amato was seen discarding an envelope which had contained the purchase money given by the agent to Burdieri.

After several more meetings with the agent and the informant, Burdieri was scheduled to make a second sale, a month after the first. On the appointed day, he met briefly with the agent, and then departed, promising to return shortly with the heroin. In fact, he never returned, and, a few days later he terminated his relationship with the agent and the informant.

On the day of the allegedly aborted sale, upon leaving the agent, Burdieri was followed by surveillance agents to a coffee shop in uptown Manhattan where he had some pie

* Except where noted, these facts are set forth in the opinion of the Court of Appeals, Appendix A, *infra*.

and coffee. (All of the other events in the case had occurred in lower Manhattan.) Meanwhile, an automobile in which Frank D'Amato was a passenger and petitioner Abramo was the owner-driver, pulled up outside the coffee shop. This was D'Amato's second and last appearance in the facts. It was petitioner Abramo's first and last appearance.

As D'Amato and petitioner Abramo exited the car, Burdieri left the coffee shop and joined them, and the three men entered the car and drove off.

The car was then observed to "square" several blocks in Manhattan at what were described as irregular speeds, and then headed for Queens.

At trial, one of the surveillance agents testified that, during the trip he had observed one of the passengers (Burdieri or D'Amato) giving directions to the driver (petitioner Abramo [A. 392].* While on a Queens highway, the car, at one point, was travelling at approximately 75 miles per hour, and suddenly exited the parkway. Burdieri was dropped off at a Queens race track, and D'Amato was dropped off across the street from a pizza shop, where he purchased a pizza, and then walked a mile or so to his home (A. 393-6, 418).** In the meanwhile, petitioner Abramo returned to Manhattan and parked the car.

All of the prosecution's trial testimony came from the undercover agent and from visual surveillance agents. Despite defense demands, the informant was never produced or identified. Burdieri was not available to either side since he had met a violent death prior to the instant indictment.

The co-defendant D'Amato testified in his own behalf and gave an innocent explanation for his meetings with Burdieri and for his later possession of the envelope in which the purchase money of the first sale had been contained.

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* Not noted in the Court of Appeals' opinion.

** The stop at the Pizza Shop is not noted in the Court of Appeals' opinion.

Predicated upon the facts recited above, as well as certain statements made to the agent and to the informant by Burdieri, the Government charged petitioner Abramo, D'Amato and Zito with the first sale and with conspiracy. At the end of the case, the trial Court dismissed the sale count as against petitioner Abramo; however, the jury convicted him upon the conspiracy count.

2. Critical Facts as to The Missing Informant and the Burdieri Statements.

As noted *supra*, the Government refused to produce or identify the paid and registered informant. Additionally, the trial Court refused to conduct a hearing, *in camera* or otherwise, as to what, if any value the informant might have for the defense (A. 196, 363-7).

Although specified at length in our appellate brief, the Court of Appeals opinion fails to properly articulate or set forth the nature and extent of the informant's involvement in the facts of this case, particularly as concerns his relationship to Burdieri, his presence at each significant meeting, his concededly purposeful introduction of misstatements of fact in a tape recorded conversation, his private meetings with Burdieri, and his witness to Burdieri's so-called "verbal acts", "conspiratorial declarations" and "statements against penal interest" which were used to make the case against the defendants. Additionally, the Court of Appeals fails to note that, during his conversations with the agent and with the informant, Burdieri made statements exculpatory of the defendants.

* * * * *

On January 31, 1973, the informant introduced the agent to Burdieri, and the three men remained together for approximately two hours. The trial version of their conversation came solely from the agent—no recording having been made. During the course of that discussion, Burdieri allegedly agreed to obtain heroin for the agent, and *the informant* introduced the name of co-defendant Frank

D'Amato as a possible source. Burdieri allegedly responded that D'Amato did *not* deal in the relatively small quantities sought by the agent (A. 133). Burdieri continued that he had other connections, including "a Cuban on West 81st Street" (A. 133) and one "Joe Beck" (A. 134). The trio then went in search of those two individuals, but met with no success (A. 134-5).

On February 15, 1973, the agent *not* being present, Burdieri gave a sample of heroin *to the informant,* who later turned it over to the agent. We have no report as to the conversation which transpired between Burdieri and the informant at that time, except that this was a sample of heroin which had become available to Burdieri (A. 138-40).

On February 16, 1973, the agent and the informant again met with Burdieri. Again, the conversation was unrecorded, and again Burdieri allegedly discussed his sources of supply, but made no reference to any of the defendants in this case. The meeting concluded with an agreement as to the terms of the first purchase (A. 138-40).

On February 20, 1973, Burdieri met with the agent and the informant prior to, and then, of course, during the transfer. Again the conversation was not recorded. According to the agent, during the pre-transfer meeting, Burdieri claimed he was going "to meet his people" in order to obtain the heroin (A. 144-5, 149). At that point, other agents observed Burdieri briefly meet with D'Amato and Zito. Thereafter, Burdieri went off *alone* and disappeared for 45 minutes, returning at the end of that time carrying a bag of heroin (A. 216-7, 308, 374-6). The trial proof does not indicate where he had obtained it. During the transfer, itself, Burdieri allegedly responded affirmatively to the agent's question: "Do you have to meet your people right away to give the money back to them?" (A. 157). It was thereafter that Burdieri went to again meet Abramo and Zito.

On February 23, 1973, a telephone conversation between the informant and Burdieri was recorded. The purpose of the call was to set up a meeting later in the day. The transcript of the conversation was introduced into evidence, and, although it sheds no light as to the identity of Burdieri's suppliers, it does show the close relationship which existed between Burdieri and the informant (Gov. X. 20; A. 817a).

A meeting among Burdieri, the informant and the agent on the afternoon of February 23rd produced the only substantive conversation which was recorded—the agent was wearing a kel transmitter, but only a portion of the recording was decipherable (Gov. Ex. 24; A. 819). The trial evidence as to the remainder of the conversation comes only from the agent's testimony. The transcript shows that the agent introduced the name of Frank D'Amato into the conversation, and Burdieri denied knowing whether D'Amato was dealing in narcotics, e.g., "Yeah; I don't know if he's in the business any more to be honest with you" (A. 820-1; *see also* A. 221, 223). Additionally, Burdieri agreed with the agent that his source, in fact, was one Joe Beck (A. 820-1; *see also,* A. 199). There is no other evidence in the case further identifying Beck or linking him in any way to the defendants.

The conversation of February 23rd continued with the agent recorded as stating to Burdieri: "The way they work is beautiful. You went right there, you gave them the money, and you came back—" Burdieri's response is indicated on the Government transcript as "inaudible" (A. 828). The agent testified that the question was posed as a surmise to Burdieri, and that Burdieri responded affirmatively (A. 168).

Finally, during the same conversation, the *informant* introduced Richard Zito's name into the conversation, but the effort came to naught (A. 829; see also, A. 236, 241).

3. Critical Facts Concerning the Claustrophobic Juror

The opinion of the Court of Appeals unfortunately summarizes the facts concerning the claustrophobic juror to the point of excising the tenor and substance of what occurred (13a). We are left with no recourse but to set forth those facts at length.

The jury commenced its deliberations at 3:40 P.M. on July 30, 1973 (A. 734). At 3:55 P.M. (A. 735-736), the Court received the following note from the jury: "Are we being impounded until we arrive at a decision or go home tonight * * * ?" The court responded that the jury would deliberate until 10 P.M., at which time they would be sequestered (A. 736). Shortly after 9:20 P.M., while considering another jury request (A. 741), the court inquired as to whether the jury had reached any verdict, and the foreman announced that verdicts of guilty as to both counts had been found as to the defendant D'Amato (A. 744). Then, on its own motion, the Court shifted jury deliberations to an air-conditioned room (A. 745).

At 10:10 P.M., following the reading of various items of testimony to the jury (A. 748), they were sent back to the jury room to continue their deliberations; however, at 10:15 P.M. (A. 751), the following occurred:

> "The Court: Taking them in the order in which they are marked, this juror here feels ill enough to want to see a doctor, so I am going to suspend the proceedings at this time so that juror No. 2 can see the doctor, and I will answer your question when we are able to proceed.
>
> "Under the circumstances, I don't see anything to be gained by further discussing this tonight here in the courthouse, so I am going to direct the Marshal to take you to a convenient hotel, and in the meantime, I want to get medical treatment for the

juror who doesn't feel well, and then we will continue our deliberations tomorrow."

However, the court then decided to discuss a legal issue which had been raised by the jury, and inquired of the afflicted juror as follows, "Mr. Killeen, does it bother you if we discuss this question?" (A. 752). The record does not reveal any response on the part of the juror, and the court went on to discuss the legal issue. Thereafter, the record notes the court as suddenly stating, "All right. The ambulance is going to come right away, Mr. Killeen" (A. 753).

On the following morning, counsel and the court were advised that the juror was suffering from claustrophobia (A. 755), and the court stated that it had been arranged for the jury to continue its deliberations *in a courtroom*, rather than a normal jury room. Defense counsel requested that the court inquire as to the qualifications of the juror to continue (A. 755). The court then ascertained from the juror that the juror would "feel better" if deliberations were conducted in a courtroom, and the questioning of the juror continued as follows:

> The Court: "Do you feel you could do it? It is the same as this. You can walk around, you can do whatever you want. It would be only for you jurors.
>
> The Juror: "That isn't the only thing that bothers me. If I didn't have to ride on these elevators, if I could just walk upstairs, *because as soon as I got in the elevator again this morning it all came back.*
>
> The Court: "This, of course, is the 6th floor. If we take you up now to the 7th floor where there is a big room like this one here, the marshals then could stay at one end and the other end so that nobody could get in there, and you could wander around as you like up there. Do you feel you could perform your duties then?

The Juror: "I will certainly *try;* your Honor.

The Court: "And if you have any difficulty at all, I want you to report it immediately, and if during the deliberations Mr. Killeen indicates any discomfort or anything that in any way bothers him, I want you to stop and then come down and have it reported to me, and I will come up to the 7th floor.

The Juror: *"All along I used to walk up and down the 6 flights and I had no trouble when I did that* [*]. But now I feel like I am confined" (A. 756-757) [emphasis added].

The judge permitted the juror to walk up the one flight of stairs, and the jury retired to continue its deliberations at 10:07 A.M. (A. 757-758). Once the jury had retired, defense counsel moved for a mistrial based upon the juror's condition, but the application was denied and an exception was noted (A. 759-761).

At 11:15 A.M., the jury was back in the courtroom to report its verdict finding the defendants Abramo and Zito guilty as to Count 1. It had not yet agreed as to the defendant Zito on Count 2 (A. 761-762). The court then inquired as follows:

The Court: "All right? Now, Mr. Killeen, how do you feel during the course of your deliberations up here in this room?

The Juror: *"Nothing seems to make me feel any better. I just feel confined.*

The Court: "Do you feel that it interfered with your judgment in any way?

The Juror: "I do, your Honor. *To be honest, I would vote either way just in order to get out.*

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* There is thus a clear statement that the juror's claustrophobia was a problem that had afflicted him from the outset of the trial and not merely one which arose during deliberations.

> The Court: "Well, I am afraid you have a mistrial here" (A. 762) [emphasis added].**

When the prosecutor sought to probe the matter further, the Court responded, *inter alia*:

> "The juror has clearly indicated unequivocally that the pressure on him was so much that he would have voted either way.
>
> * * * * *
>
> "I wouldn't care less who you consult with, and even if you come up and tell me that they objected to this violently, I wouldn't be moved at all. The juror has clearly indicated, and *even observing him, and if you observe him you will see that he is in a state of mind that he had to be nudged to direct his attention to me, and last night I noticed his demeanor also. The man is in an uncomfortable position and he has indicated clearly that he would vote any way in order to get out of here today. He just can't stand this any longer. Is that a fair statement?*
>
> Juror No. 2: *"It is the God's truth, your Honor"* (A. 762-763) [emphasis added].

It was only after it was inadvertently indicated to the juror that he could still save the guilty verdicts by stating that he was of sound mind when he rendered them, that he shifted his position by stating, in response to an inquiry of the court, that " . . . it [the verdicts] happened earlier, and the feeling wasn't as strong in me as it is now" (A. 764). Based on that, and based upon a perfunctory ques-

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** That the juror's state of desperation was even worse than revealed by the transcript is shown by the colloquy at the time of sentence in which it was agreed that the stenographer had failed to record certain of the vital aspects of the incident (A. 780, *et seq.*).

tioning of the other jurors,* the Court reversed its position and received their verdict.

Reasons for Granting the Writ

Introduction

The present case presents substantial policy and constitutional questions concerning the quality and sufficiency of evidence necessary for a federal conspiracy conviction. As will be shown below, the Court of Appeals for the Second Circuit has, in recent years so liberalized the rules applicable to conspiracy prosecutions that a federal conspiracy trial has evolved into a dumping ground for what would otherwise be considered incompetent proof, from highly questionable sources, for the purpose of sustaining clearly speculative circumstantial evidence cases. To date, this Court has not passed upon those changes.

This Court has stated that it views "with disfavor attempts to broaden the already pervasive and widesweeping nets of conspiracy prosecutions." *Grunewald* v. *United States,* 353 U.S. 391, 405 (1957). It cannot be doubted that the potential for prejudice to an accused posed by such an expansion is compounded when the subject of the alleged conspiracy concerns narcotics.

The present case amply demonstrates the manner in which a defendant, against whom there is no direct evidence, can nonetheless be shackled into a state of impotency.

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*The Court: "All right. Now let me ask you this. You jurors are better able to answer this question than I am. Did any of you, everyone except Mr. Killeen, coerce, persuade, or in any way cause him to come to a verdict on these counts as far as Abramo is concerned and Zito is concerned—as to the first count? (no response)

The Court: "Mr. Foreman, did you discuss anything with him or cause him to change or make up his mind?" (A. 767)

All of the jurors merely replied, "No."

Here, not only did the petitioner have to contend with acts and statements not made in his presence, he was also barred from calling as a witness the only person who could have contested or otherwise undermined the government's "proof."

A great deal of reliance is placed upon the ability of jurors to perceive defects in proof and follow the fine points of law upon which they are charged by the Court. In a conspiracy case such as the present one such reliance can frequently be strained. But here even that semi-myth collapses in view of the clear claustrophobic anguish of one of the jurors.

I.

The petitioner was deprived of a fair trial and of his constitutional right to secure the attendance of witnesses by the refusal of the trial court to compel the government to reveal the identity of the paid informant. At least, the trial court should have conducted an *in camera* hearing to determine whether the informant possessed information which would have been of value to the defense.

Repeated efforts by the defense to learn the identity of the paid, registered informant were denied by the trial court (A. 196, 362-367), as were efforts to secure an *in camera* hearing on the issue (A. 363).

As shown *supra*, at pp. 7-9, the informant was intricately involved in practically every aspect of this case. He stood in a position to contradict, correct or supplement the version of events given by the narcotics agent.

In rejecting our argument that the informant should have been produced or that an *in camera* hearing should have been held, the Court of Appeals minimizes, without demonstration or analysis, the extent of the informant's involvement. It then goes on to treat the matter as one relegated to the exercise of discretion by the trial judge (12a-

13a). We respectfully submit that the Court of Appeals is wrong to the point of ignoring the clear holdings of this Court. The informant was a *witness* to material events which were essential to the conviction of appellant. Moreover, it is ironic that the Court of Appeals can bypass the Sixth Amendment requirement of confrontation by reliance upon the narcotic agent's claims that Burdieri committed certain "verbal acts" or "made statements against his penal interest" (7a-12a), yet deny the defense any opportunity to test whether those alleged events ever occurred.

The rule protecting the identity of police operatives from disclosure was founded upon the recognition that such individuals would thus be encouraged to communicate intelligence of crime which would result in "the furtherance and protection of the public interest in effective law enforcement" *Roviaro* v. *United States*, 353 U.S. 53, 59 (1957). However, this rule is not absolute. It is limited by the "fundamental requirement of fairness" (353 U.S. at 53).

More recently, in *Branzburg* v. *Hayes*, — U.S. —, 92 S. Ct. 2646 at 2664 (1972), this Court restated the requirement that the informant privilege must yield when such disclosure would be vital to the defense:

> " 'The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.' *Roviaro* v. *United States*, 353 U.S. 53 (1957).
>
> "Such informers enjoy no constitutional protection. Their testimony is available to the public when desired by grand juries or at criminal trials; their identity cannot be concealed from the defendant when it is critical to his case. *Roviaro* v. *United States*, *supra*, at 60-61, 62; *McCray* v. *Illinois*, 386 U.S. 300,

310 (1967); *Smith* v. *Illinois*, 390 U.S. 129, 131 (1968); *Alford* v. *United States*, 282 U.S. 687, 693 (1931). * * *"

Roviaro, supra, specifically held that:

"A further limitation on the applicability of the privilege arises from the fundamental requirements of fairness. Where the disclosure of an informant's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. In these situations, the trial court may require disclosure and, if the government withholds the information, dismiss the action.

* * * * *

"We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest and protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders non-disclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." (353 U.S. at 60-62).

In *Roviaro,* a narcotics agent was hidden in the trunk of the informant's car and heard the defendant transferring an alleged packet of narcotics to the informant. Under those circumstances, this Court held that it was error for the government to refuse to reveal the identity of the informant.

See also: *McCray* v. *Illinois,* 386 U.S. 300, 309-310 (1967).

Smith v. *Illinois,* 390 U.S. 129 (1968) and *Alford* v. *United States,* 282 U.S. 687 (1931), both involved instances

where this court reversed criminal convictions under circumstances where government informants testified as trial witnesses, but the defense was precluded from ascertaining their true names or addresses.

While revelation of the identity of an informant may be and has been required where necessary to establish probable cause.* ". . . disclosure [at trial] has been required where the informant was an active participant or was present at the scene of the crime" *United States* v. *Skeens*, 449 F.2d 1066, 1071 (D.C. Cir., 1971). See, e.g., *Lopez-Hernandez* v. *United States*, 394 F.2d 820 (9th Cir., 1968); *United States* v. *Roberts*, 388 F.2d 646, 648-649 (2d Cir., 1968); *Gilmore* v. *United States*, 256 F.2d 565, 566-567 (5th Cir., 1958); *United States* v. *Miramon*, 443 F.2d 361 (9th Cir., 1971); *United States* v. *Barnett*, 418 F.2d 309 (6th Cir., 1969).

As was stated by the court in *Barnett*, *supra*:

> "The concealment of the identity of an eye-witness informer, who under the circumstances of the case was the only person who could amplify, modify or controvert the statements of the government's key witness, denied the accused evidence likely to be relevant and helpful to his defense, and probably essential to the fair determination of his guilt or innocence" (418 F.2d at 312).

See also: *Proposed Rules of Evidence for United States Courts and Magistrates*, Rule 510(c)(2).

The government's case was purely circumstantial against the defendants, and it drew its meaning solely from the statements and actions of Burdieri. The informant may have contradicted other government evidence concerning those statements or actions, he may have been possessed of additional information which would have exculpated the

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* *See*: *United States* v. *Robinson*, 325 F.2d 391 (2d Cir., 1963); *United States* v. *Hurse*, 453 F.2d 128 (8th Cir., 1972).

defendants, while not contradicting other government evidence, or he may have given a version of events, which if believed, could have convicted, or, on the other hand, could have generated a reasonable doubt. *Cf. United States* v. *Polisi*, 416 F.2d 573 (2d Cir., 1969).*

All of the above considerations apply, *a fortiori*, with respect to the petitioner Abramo, whose link with the alleged crime was exceedingly tenuous, and against whom the government's case, in greater part, relied upon events which occurred in his absence.

For all of the above reasons, the failure to reveal the identity of the informant requires that a new trial be granted, if, in other respects, the evidence against petitioner is held by this court to have been sufficient to sustain the conviction. In the alternative, the case should be remanded to the trial court for a hearing to determine whether the informant would have, in fact, been of value to the defense.

II.

The Government failed to establish beyond a reasonable doubt that petitioner Abramo conspired with anyone to traffic in narcotics.

In *Ingram* v. *United States*, 360 U.S. 672 (1959), this Court reaffirmed the proposition that:

> "Without knowledge, the intent cannot exist. * * * Furthermore to establish an intent, the evidence of knowledge must be clear not equivocal. * * * This because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning * * * a dragnet to draw in all substantive crimes" (360 U.S. 680).

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* "Both versions made Anthony Polisi a participant in the robbery scheme, one as the leader, the other as a relatively minor accomplice. But the fact that the two versions differed so drastically might well cast doubt upon the truth of either or both" (416 F.2d at 578-579).

See also: *Morrison* v. *United States*, 291 U.S. 82, 93 (1934); *United States* v. *Falcone*, 311 U.S. 205, 210-211 (1940).

Petiitoner respectfully submits that the facts of this case, including all of the hearsay statements and activities of Burdieri, fail to establish that petitioner had, beyond a reasonable doubt, either the knowledge or intent necessary for a violation of the federal narcotic laws.

The opinion of the Court of Appeals summarizes the facts as to petitioner Abramo as follows:

> "B. *Abramo.* In Abramo's case, the sufficiency of the evidence independent of Burdieri's hearsay statements presents us with a considerably more difficult decision. The independent evidence with respect to the March 27 transaction, viewed simplistically, shows only that after Burdieri had driven around in McElroy's automobile, counting the money that McElroy had brought with him, between 8:10 p.m. and 8:50 p.m., Burdieri took a taxi to a coffee shop, which was approached by Abramo in his wife's car and then on foot and from which Burdieri exited to join Abramo and D'Amato in Abramo's automobile, the roundabout chase ensuing, with Abramo ultimately dropping off Burdieri and D'Amato" (7a).

The Court of Appeals then goes on to find that *Burdieri* spoke and acted as though he intended to consummate a heroin transaction on that day, and as though the heroin was to come from some unnamed other person or persons. For the purposes of the instant issue, we shall assume that was true, i.e., Burdieri apparently was in a conspiracy with someone to traffic in heroin. As the Court of Appeals indicates, however, those facts do not tell us whether *Abramo* was a knowing participant in such a conspiracy. The Court of Appeals leaps that gap with the following reasoning:

> "* * * On balance we think that the jury may properly have been permitted to answer in the affirm-

ative, drawing the inference first from the fact that the meeting was so arranged that Abramo and D'Amato could observe whether Burdieri was being followed by way of his going into the coffee shop rather than waiting on the corner, and, second, from the evasive automobile action taken subsequently. * * *" (10a).

The multiple inferences which the Court of Appeals seeks to draw simply will not wash with the facts. It is pure speculation, assumptive of guilt, that Abramo positioned his car to see if Burdieri was being followed.* Even if it is

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* The opinion's claim that Abramo was positioned to observe Burdieri enter the coffee shop is not supported, but rather contradicted, by the record. It is upon that erroneous claim that the counter-surveillance rationale is developed. The only government agent to observe the scene testified as follows:

"I followed the taxi cab to 36th Street and 3rd Avenue, at which time Burdieri got out of the taxi cab and entered the coffee shop at that location.

* * * * *

"At that point I drove past the coffee shop, circled the block and took a position on 36th Street just east of Lexington Avenue on the north side of the street.

* * * * *

[The agent then detailed the route that he took in circling this midtown Manhattan block.]

* * * * *

"Q. Were there other cars parked on the north side? A. No sir.

* * * * * *

"After a few moments of being parked at this location I observed a dark colored Lincoln drive past me in a manner slower than traffic, the normal traffic, flow of traffic that was going down the street. I observed the Lincoln pull over at the north—it would be the northwest corner, the north side of the street, of 36th Street and 3rd Avenue, on 36th Street" (A. 387-389).

Thus, the only evidence in the case shows that the Abramo vehicle did not arrive on the scene until well after Burdieri had entered the coffee shop, since, in the interim, enough time elapsed for the agent to completely circle the block.

assumed that the passenger, D'Amato was guilty of the crime charged, there is no way of knowing whether Abramo, as a friend, was innocently giving D'Amato a lift. Nothing prior to the so-called chase tells us anything concerning Abramo's knowledge or state of mind.

Realistically, the only possible element bearing upon the issue of whether Abramo knowingly participated in the conspiracy, is the allegedly evasive driving he did after Burdieri was picked up. A critical fact omitted from the Court of Appeals opinion is that one of the agents who trailed Abramo's car during the drive testified that one of the passengers was manifestly giving directions to Abramo (A. 392). Assuming for the moment that Abramo was, in fact, attempting to evade a "tail", even the Second Circuit has held in other cases that mere efforts on the part of an individual to "extricate himself from suspicious circumstances" do not rise to the dignity of proof of guilt, *United States* v. *Kearse*, 444 F.2d 62, 64 (2d Cir., 1971) and *United States* v. *Euphemia*, 261 F.2d 441 (2d Cir., 1958). On that rationale, his allegedly evasive driving, which, at most, tells us that he discovered he was being followed, does not tell us that he knew a drug conspiracy was in progress or that he knowingly participated in that conspiracy.

Petitioner Abramo's problem is aptly described in the following often cited excerpt from the concurring opinion of Mr. Justice Jackson in *Krulewitch* v. *United States*, 336 U.S. 440 (1949):

> "When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly the prosecution should first establish *prima facie* the conspiracy and identify the conspirators, after which evidence of acts and declarations of each in the course of its execution are admissible. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even

> known about, but which help to persuade the jury of the existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon the assumption that the conspiracy existed. * * *
>
> "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits" (336 U.S. at 453-454).

The judgment of guilt against petitioner Abramo stands solely upon the fact that he associated with other persons. Neither the guilt of Burdieri nor the suspicion which surrounded D'Amato was sufficient to overcome the presumption of innocence to which Abramo was entitled. As was stated in *Scales* v. *United States*, 367 U.S. 203, 224-225 (1961):

> "In our jurisprudence guilt is personal, and when the imposition of punishment on a status or on conduct can only be justified by reference to the relationship of that status or conduct to other concededly criminal activity . . . that relationship must be sufficiently substantial to satisfy the concept of personal guilt in order to withstand attack under the due process clause of the Fifth Amendment."

It is respectfully submitted that the "concept of personal guilt" was not sustained beyond a reasonable doubt as against the petitioner Abramo.

III.

The Court of Appeals has reduced the standards of proof in conspiracy cases below proper evidentiary and constitutional requirements.

The Court of Appeals found as admissible, as against the petitioner Abramo, Burdieri's so-called "verbal acts" for the purpose of establishing that a sale of heroin was actually scheduled to occur on the evening of March 27, 1973 (7a-9a). Taking that fact, together with the manner of petitioner Abramo's operation of the automobile on that evening, the Court concluded that petitioner's participation in the conspiracy was established by a "fair preponderance" of the evidence. Once having reached that point, the Court of Appeals applied the following principle it had established in *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir., 1969), *cert. denied*, 397 U.S. 1028 (1970):

> "While the practicalities of a conspiracy trial may require that hearsay be admitted 'subject to connection' the Judge must determine, when all the evidence is in, whether in his view the prosecution has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances. If it has, the utterances go to the jury for them to consider along with all the other evidence in determining whether they are convinced of defendant's guilt beyond a reasonable doubt. * * * "

By virtue of the *Geaney* principle, the Court of Appeals reasoned herein, that all of Burdieri's otherwise hearsay utterances, including the assertion that he was going directly to meet his "people", became admissible for the purpose of determining whether petitioner Abramo was a member of the conspiracy.

In a carefully reasoned dissent, District Judge Dooling (sitting by designation), criticized the *Geaney* rationale at length in *United States* v. *Calarco*, 425 F.2d 657, at 661-665 (2d Cir., 1970). He said, *inter alia*:

> "The present case may now seem at several removes from the context of Bruton v. United States, 1968, 391 U.S. 123, but underlying Bruton is the value put on the defendant's right to confront and to cross-examine his accuser. * * * Cf. Douglas v. Alabama, 1965, 380 U.S. 415, 418-519. And in the frame of reference in which Geaney fixes the matter, the aim and effect of the procedure are to dilute the reasonable doubt requirement—a due process exaction, Matter of Winship, 1970, 397 U.S. 358, at the point at which, in a large class of prosecutions, the evidence of the prosecution is frequently most suspect, the informer or accomplice testifying to what a silent co-defendant said the absent defendant had said. If the words had a place in the record because they functioned in executing the crime or forming the criminal plan, they were admissible. But does not basic fairness require that the jury be told at once that the declaration is not evidence that the absent defendant was a participant in the crime and will never become such evidence no matter what other evidence is brought in? The declaration as a verbal act may become, perhaps, the responsibility of the absent defendant as a proved participant in the offense, but in an evaluation of the proofs in the legal perspective, it cannot contribute to a finding that he was a party to the corrupt program.
>
> "If there be truth in the idea of jury incompetency to winnow evidence in pursuance of instructions * * *, the consequence would not be the admission of such evidence for all purposes upon the Judge's impression that a preponderance of the evidence, if believed, would indicate that the absent defendant was asso-

> ciated in the venture, but the exclusion of the evidence for every purpose on the ground that its prejudicial effect as spurious evidence of participation outweighs its utility as evidence of a constitutive act. Mr. Justice Jackson's vivid portrayal of the pitfalls of conspiracy practice in the Courts * * * surely argues for the due process importance of precision in jury instruction. * * * " (424 F.2d at 664-665).

Notwithstanding the above noted rationale, and notwithstanding the fact that this Court has never passed upon the *Geaney* principle, it has become the mainstay of the Second Circuit in conspiracy cases.*

In *California* v. *Green*, 399 U.S. 149 at 155 (1970), and and in *Dutton* v. *Evans*, 400 U.S. 74, at 82 (1970), this Court made clear that the confrontation clause of the Sixth Amendment, on the one hand, and the hearsay rule of evidence, on the other, will separately be applied to the fact situations of a given case to determine whether one

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* See, for example, *United States* v. *Lopez*, 420 F.2d 313, 317 (2d Cir., 1969); *United States* v. *Eskow*, 422 F.2d 1060, 1069 (2d Cir., 1970); *United States* v. *Marquez*, 424 F.2d 236, 239 (2d Cir., 1970); *United States* v. *Lozaw*, 427 F.2d 911, 915 (2d Cir., 1970); *United States* v. *Jacobs*, 431 F.2d 754, 761 (2d Cir., 1970); *United States* v. *DeSapio*, 435 F.2d 272, 282 (2d Cir., 1970); *United States* v. *Quinn*, 445 F.2d 940, 944 (2d Cir., 1971); *United States* v. *Calabro*, 449 F.2d 885, 889, 890 (2d Cir., 1971); *United States* v. *Pordum*, 451 F.2d 1015, 1016 (2d Cir., 1971); *United States* v. *Cafaro*, 455 F.2d 323, 326 (2d Cir., 1972); *United States* v. *Grant*, 462 F.2d 28, 33 (2d Cir., 1972); *United States* v. *Fantuzzi*, 463 F.2d 683, 689, 690 (2d Cir., 1972); *United States* v. *Projansky*, 465 F.2d 123, 137 (2d Cir., 1972); *United States* v. *Cassino*, 467 F.2d 610, 617, 618 (2d Cir., 1972); *United States* v. *Christophe*, 470 F.2d 865, 870 (2d Cir., 1972); *United States* v. *Rosenstein*, 474 F.2d 705, 711, 712 (2d Cir., 1973); *United States* v. *Domenech*, 476 F.2d 1229, 1232 (2d Cir., 1973); *United States* v. *Ruiz*, 477 F.2d 918, 920 (2d Cir., 1973); *United States* v. *Wyler*, 487 F.2d 170, 172 (2d Cir., 1973).

or the other has been violated. Petitioner respectfully submits that the *Geaney* principle, applied against him in this case, violates both.

Significantly, the Court of Appeals, in the instant case, was not able to muster up enough evidence of petitioner's own conduct in order to bring the *Geaney* principle into play. Instead, the Court found it necessary to add to the petitioner's conduct the so-called verbal acts of Burdieri (7a-9a). In doing so, the Court stretched the verbal act theory beyond reasonable bounds. In short, the Court concluded, that Burdieri's counting of money is explained by his statement that he was going to purchase heroin, thus removing this clear hearsay from the operation of the hearsay rule. We respectfully submit that this Court should reject such reasoning as being pure sophistry.

Similarly, the Court of Appeals sought to circumvent the confrontation problem raised by the admission of Burdieri's hearsay statements by holding that those statements fell within "... the well established co-conspirator exception to the hearsay rule [since] the extrajudicial statements were decidedly against the penal interests of the speaker when made." If that is so, then all statements of co-conspirators in furtherance of and during the conspiracy, are admissible upon the same theory.

In *Dutton* v. *Evans*, 400 U.S. 74 (1970), this Court sharply divided upon the issue of whether a particular hearsay declaration had violated a defendant's right to confrontation and cross-examination. While it is true that the majority opinion indicated that a statement against penal interest was one of several cumulative factors which served as "indicia of reliability which have been widely viewed as determinative of whether a statement may be placed before the jury though there is no confrontation of the declarant" (400 U.S. at 89), the facts of that case

are grossly different from the facts of petitioner's case. There, the hearsay statement was a particularly minor aspect of the proof against the defendant. Here, the hearsay declarations of Burdieri were absolutely essential to a conviction of petitioner.*

IV

Petitioner was deprived of a fair trial by virtue of the fact that one of the jurors apparently suffered from claustrophobia throughout the trial and had an acute and hysterical attack of claustrophobia during the course of deliberations. The shadow thus cast upon the integrity of the jury's deliberations required a new trial merely by virtue of what was revealed. In any event, the defense was, at least, entitled to a full hearing with regard to the nature and effect of the juror's illness.

The facts are outlined in full *supra*, at pp. 10-14.

The juror in the present case was claustrophobic even before deliberations commenced, for he admitted that during each day of the trial he walked up and down the six lengthy flights to the courtroom (*supra*, p. 12). Although the jury had been shifted to an air conditioned room, the juror became so ill that he had to be taken to a hospital by ambulance on the first evening of deliberations, the case having gone to the jury at 3:40 P.M. (*supra*, pp. 10-11).

On the following morning, in an effort to alleviate the juror's condition, the trial judge permitted the jury to deliberate in a full courtroom, although the juror admitted that "this morning it all came back" (*supra*, at p. 11). An hour and seven minutes later, when the jury reported its

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* Additionally, as we argue *supra*, at p. , petitioner was deprived of the opportunity to test the truth of whether such a declaration of penal interest had ever been made, since the government and the trial Court would not grant the defense access to the informant who had allegedly been present when most of those statements were made.

verdict as to petitioner, inquiry by the Court led the juror to state:

> "Nothing seems to make me feel any better. I just feel confined" (*supra*, p. 12).
>
> * * * * *
>
> "I do [feel it interfered with my judgment] your Honor. To be honest, I would vote either way just in order to get out" (*supra*, p. 12).

Stating that it was going to declare a mistrial as to petitioner, the Court commented:

> "The juror has clearly indicated, even observing him, and if you observe him you will see that he is in a state of mind that he had to be nudged to direct his attention to me, and last night I noticed his demeanor also. The man is in an uncomfortable position and he has indicated clearly that he would vote any way in order to get out of here today. He just can't stand this any longer. Is that a fair statement?
>
> Juror No. 2: "It is the God's truth, your Honor" (*supra*, p. 13).

28 U.S.C. § 1865 provides, in pertinent part, that one may not serve as a juror if he or she: "is incapable, by reason of mental or physical infirmity, to render satisfactory jury service."

In *United States* v. *Silverman*, 449 F.2d 1341 (2d Cir. 1971), *cert. denied*, 405 U.S. 918 (1972), where a juror was challenged based upon his illiteracy, the Court of Appeals said: "We would not hesitate to find prejudice requiring reversal where the claimed disqualification might have adversely affected the challenged juror's ability to decide a case intelligently" (449 F.2d at 1344). That principle was clearly not applied here.

In *People* v. *Kurth*, 216 N.E. 2d 154 (S. Ct. Ill., 1966), a judgment was reversed where a juror "told the court she

was nervous and also told him she came from a home where her father was a heavy drinker and every once in a while he would take the children and lock them in an attic and that ever since she had a fear of confinement." The Court held:

> "While we are unable to determine whether the deliberation of the juror in question was, in fact, influenced by her fear of confinement, in a case of this magnitude, where of necessity lengthy deliberation would normally be required to consider the evidence and the instructions of the Court, the possibility of prejudice is high. The difficulty which the parties encountered in selecting a jury who had no preconceived notions concerning the case has already been related. To accept a juror who acknowledged a long standing fear of closed places and to deny counsel the right to interrogate this juror, or even disclose her name, was, under the circumstances prejudicial error. Although we are reluctant to reverse these convictions for an error which occurred even prior to the reception of the voluminous testimony, we are of the opinion that the interests of justice require that a new trial be granted."

See also: *United States* v. *Pleva*, 66 F.2d 529 (2d Cir., 1933), where a new trial was ordered because a juror had a chronic physical condition which made it impossible for him to have deliberated free from the fear of adverse consequences to his own health.

The disqualification of a single juror clearly requires a new trial. *Parker* v. *Gladden*, 385 U.S. 363 (1966); *United States* v. *Rattenni*, 480 F.2d 195 (2d Cir., 1973). In *Parker*, the prosecution argued that a taint on two jurors was harmless, since Oregon, the prosecuting State, required that only ten of the twelve jurors need vote for conviction. This Court dismissed this argument, observing, *inter alia*:

> ". . . petitioner was entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors" (385 U.S. at 366).

It would seem clear that a defendant is as much entitled to 12 jurors who are capable of intelligently evaluating, discussing and voting on a case, as to 12 impartial and unprejudiced jurors.

In the present case, a reading of the record clearly illustrates that the juror's problem was chronic since, although unrevealed, it had existed throughout the trial. Likewise, the record leaves no doubt that the juror was in an absolute state of panic, observable to the Judge himself, and did not shift his position until it was indicated to him that he could do so without fear of being sent back to the jury room to continue deliberations. Aside from the embarrassment normally attendant upon his affliction, the juror here was faced with the problem of avoiding the additional embarrassment of having had the court and his fellow jurors waste the efforts of the preceding days. In view of this, it is readily understandable that the juror would take the easy way out of attempting to save what he could, notwithstanding the true state of his mind.

We respectfully submit that under these circumstances, the cloud cast upon the entire jury verdict in this case is such that due process and the proper administration of justice in the Federal Courts requires the granting of a new trial based on the record as it stands. In the alternative, it was error for the court not to have convened a hearing and to have obtained such expert testimony as might have been available to ascertain as well as possible the nature, extent and effect of the juror's illness upon his ability to follow the evidence and properly and fully participate in deliberations.

CONCLUSION

For all of the above reasons, the petition for a writ of certiorari should be granted, the judgment of conviction should be ordered reversed, and the indictment should be ordered dismissed; in the alternative, petitioner should be granted a new trial.

Respectfully submitted,

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APPENDIX

APPENDIX A

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 591-93—September Term, 1973
(Argued December 21, 1973 Decided March 14, 1974)
Docket Nos. 73-2437-39

UNITED STATES OF AMERICA,

Appellee,

—v.—

FRANK D'AMATO, PHILIP ABRAMO and RICHARD ZITO,

Defendants-Appellants.

Before:

FRIENDLY, HAYS and OAKES,

Circuit Judges.

Appeals from judgments of the United States District Court for the Southern District of New York, John M. Cannella, *Judge,* convicting, after a jury verdict, appellants of conspiring to possess and distribute heroin in violation of 21 U.S.C. § 846, and additionally convicting appellant D'Amato of possession and distribution of 487.27 grams of heroin in violation of 21 U.S.C. §§ 812, 841(a)(1) & 841(b)(1)(A).

Affirmed.

HENRY J. BOITEL, New York, N.Y., *for Appellant Abramo.*

FRANK A. LOPEZ, Brooklyn, N.Y., *for Appellants D'Amato and Zito.*

BANCROFT LITTLEFIELD, JR., Assistant United States Attorney (Paul J. Curran, United States Attorney for the Southern District of New York; John D. Gordan III, Assistant United States Attorney, on the brief), *for Appellee.*

OAKES, *Circuit Judge*:

Appellants were the subjects of a two-count indictment, count one charging a conspiracy to possess and distribute heroin in violation of 21 U.S.C. § 846, and count two charging possession and distribution of 487.27 grams of heroin on February 20, 1973, in violation of 21 U.S.C. §§ 812, 841 (a)(1) & 841(b)(1)(A).[1] After a five-day jury trial, all appellants were convicted on the conspiracy count. Appellant D'Amato was also convicted on the substantive count; that count was dismissed as against appellant Abramo, and the jury failed to return a verdict on that count with respect to appellant Zito. Appellants challenge their conviction on various grounds: that the evidence was insufficient to sustain the convictions under the conspiracy count; that they were deprived of a fair trial by the trial court's refusal to compel the Government to reveal the name of a paid, registered informant of the Bureau of Narcotics and Dangerous Drugs (BNDD), as of July 1, 1973, the Federal Drug Enforcement Administration (FDEA), so that he could be called as a witness; that the introduction

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[1] Also charged as a co-conspirator in the original indictment was Frank Burdieri, who, as will be seen, acted as a go-between in narcotics transactions that formed the basis of the Government's case. Burdieri was arrested on April 9, 1973, almost two months prior to the arrest of appellant D'Amato and more than two months before the arrests of appellants Abramo and Zito. Burdieri disappeared some 10 days after his arrest and apparently his severely beaten body was found washed up on Silver Beach in the Bronx with one bullet in the back of his head.

into evidence of deceased co-conspirator Frank Burdieri's statements was reversible error because of insufficient indicia of reliability and because those statements were generally not made in furtherance of the conspiracy charged; and that the medical condition of one of the jurors, discovered during the jury's deliberation, entitled them to a new trial or, in the alternative, to a full hearing with regard to the nature of that illness and its effect on the entire proceedings. Appellant Zito further asserts that count two should have been dismissed as to him by the district court. After careful consideration of these arguments, we reject them and affirm the convictions.

I. Sufficiency of the Evidence.

A brief statement of the facts adduced at trial is required. On January 31, 1973, special agent McElroy of the BNDD, acting in an undercover capacity, went to a Manhattan bar accompanied by a paid BNDD informant, who introduced McElroy to the late Frank Burdieri. Burdieri, according to McElroy's testimony, said that he had connections through which heroin could be purchased, one such being appellant D'Amato. D'Amato, said Burdieri, was "very big" in the heroin business, having taken over the heroin operations of one Vinnie Pappa. At the end of this meeting, Burdieri agreed to contact McElroy when he had lined up some heroin.

On February 16, Burdieri informed McElroy that the latter could purchase ½ kilogram of heroin for $13,000, which included a commission of $500 for Burdieri. McElroy told Burdieri that it would take a few days to obtain the money and agreed to meet Burdieri on February 20. On that day, prior to the meeting, McElroy placed $12,900 in a plain white envelope which had been marked for later identification. McElroy, Burdieri and the informant met at noon, at which time Burdieri told McElroy that the

money had to be advanced before receipt of the heroin. McElroy refused to "front" the money in this fashion, and Burdieri agreed to find out whether delivery could be effected without the "front" of the money. Later, telling McElroy that he was going to meet "his people," Burdieri exited McElroy's automobile and motioned over to the curb a black 1973 Oldsmobile driven by a person later identified as appellant Zito and carrying a passenger identified as appellant D'Amato. Burdieri spoke through the passenger window to D'Amato and Zito for five to ten minutes, returned to McElroy's automobile and told McElroy that he had just talked to "his people" and that the buy could be made within the next 30 minutes without the moneys being "fronted." Burdieri departed in a taxi to pick up the heroin and was observed some 35 minutes later walking down a sidewalk carrying a brown paper bag in a newspaper followed by the Oldsmobile containing D'Amato and Zito. Burdieri walked to a coffee shop where he met McElroy; they then went to McElroy's automobile, where Burdieri gave McElroy the bag containing slightly less than ½ kilogram of heroin in exchange for the envelope containing $12,900. Burdieri asked McElroy to drop him off at a specific place because Burdieri had "to meet his people right away to give them the money." At that place, Burdieri was dropped off and immediately picked up by the same Oldsmobile, Burdieri getting into the back seat. The Oldsmobile was followed by other FDEA agents, and they retrieved the marked envelope which was thrown from the automobile by D'Amato. Burdieri was dropped off shortly thereafter. At a meeting on February 23, again with the informant present, McElroy asked Burdieri whether he had taken the money directly to his people on February 20; Burdieri responded in the affirmative.

At a meeting on March 26, Burdieri and McElroy negotiated relative to the purchase of more heroin. Burdieri

said that "his people" usually dealt only in four or five kilo quantities of heroin but would sell a half kilo for $12,500 and replied affirmatively to a question by McElroy as to whether they were "the same people" who had furnished the February 20 heroin. They met, after several telephone calls and another meeting on the afternoon of March 27, once again on March 27 at 8:10 p.m., to consummate the purchase of a kilogram in their second transaction at a price of $28,000, Burdieri saying "I've got to meet my people at 9 o'clock" that evening. After McElroy gave him the money and drove Burdieri around for a while so that he could count it, Burdieri was dropped at 23rd Street and Second Avenue. He left and then took a taxi, under considerable observation, to 36th Street and Third Avenue, where he entered a coffee shop at the southwest corner. At this point, a 1972 blue Lincoln Continental, registered to Mrs. Abramo, which had been waiting down the block, pulled up slowly along 36th going east toward the coffee shop and stopped on the opposite side of 36th Street from the shop. Appellant Abramo was driving the Continental, with D'Amato as his passenger. At exactly nine o'clock Abramo and D'Amato got out of the automobile. Burdieri came out, joined them, and the three of them entered the automobile.

After pulling away from the curb, the Continental, followed by a veritable cavalcade of four or five surveillance vehicles, proceeded on a course and at such speeds as to warrant, if not compel, the inference that the surveillance had been detected and that an attempt was being made to escape from it. For example, the car squared two blocks in the mid-fifties, slowing down and speeding up, drove to the vicinity of Sutton Place, suddenly speeded up again and went by way of the East River Drive and Triborough Bridge to Roosevelt Raceway where Burdieri was let out. The chase then assumed proportions of "The French Connection," for while doing 75 miles per hour on the extreme

left lane of the Meadowbrook Parkway towards Queens, a last-second swerve by Abramo across three lanes to the exit for the Long Island Expressway left all but one surveillance vehicle in the lurch. The occupants of that stout automobile observed the dropping off of D'Amato at a telephone booth in Queens, from which he walked 1.3 miles to his home. After twice squaring a three or four block area near the phone booth, Abramo returned his wife's automobile to Manhattan. On March 29, Burdieri explained to McElroy that he had not returned with the package (of heroin) because "agents" had followed him to and during the meeting with "his people."

A. *D'Amato and Zito.* The sufficiency of the overall evidence against D'Amato and Zito, given the facts adduced at trial and condensed above, cannot be subject to serious doubt. The contention that the Government's proof with respect to the February 20 transaction was fatally deficient in that Burdieri was not under surveillance for some 35 to 45 minutes, during which time he *might* have picked up the ½ kilogram of heroin from a source other than the Zito automobile, is not in the least persuasive. The inference apparently drawn by the jury was that Burdieri did in fact obtain the brown package from D'Amato and Zito, and that inference was clearly permitted by the evidence. The jury obviously chose to disbelieve D'Amato's own version of these dealings to which he testified. Examining the record, we also conclude that independent evidence as to the February 20 transaction was sufficient, under the standards enunciated by this court, to permit the introduction of Burdieri's statements through McElroy's testimony as statements made by a co-conspirator in furtherance of the conspiracy. These statements were, of course, admitted subject to connection; the mere physical activities of both D'Amato and Zito, as well as the non-hearsay testimony of FDEA agents, establish by a fair preponderance that Burdieri, D'Amato and Zito were in fact

co-conspirators. *United States* v. *Geaney*, 417 F.2d 1116, 1120 (2d Cir. 1969), *cert. denied*, 397 U.S. 1028 (1970). *See United States* v. *Manfredi*, Nos. 72-2278-82 (2d Cir. Nov. 23, 1973), slip op. at 5607. The question whether appellants were denied their sixth amendment rights of confrontation as a result of the admission of McElroy's testimony as to Burdieri's statements will be dealt with in Part II, *infra*.

Appellant D'Amato's contention that the evidence with respect to the substantive count was insufficient as at matter of law to convict him is frivolous.

B. *Abramo*. In Abramo's case, the sufficiency of the evidence independent of Burdieri's hearsay statements presents us with a considerably more difficult decision. The independent evidence with respect to the March 27 transaction, viewed simplistically, shows only that after Burdieri had driven around in McElroy's automobile, counting the money that McElroy had brought with him, between 8:10 p.m. and 8:50 p.m., Burdieri took a taxi to a coffee shop, which was approached by Abramo in his wife's car and then on foot and from which Burdieri exited to join Abramo and D'Amato in Abramo's automobile, the roundabout chase ensuing, with Abramo ultimately dropping off Burdieri and D'Amato.

We say "viewed simplistically," because the foregoing represents an examination of the evidence without reference to any declaration of Burdieri whatsoever, and treats all of his declarations as inadmissible hearsay. Once we recall, however, that verbal acts—contemporaneous utterances explaining nonverbal conduct or its tenor—are not hearsay in the true sense, since they do not constitute an assertion to evidence the truth of a fact asserted, 6 Wigmore, Evidence § 1772, at 191 (3d ed. 1940), we can separate those declarations of Burdieri admissible for purposes of establishing the existence of a conspiracy for the sale of heroin and Abramo's membership therein, from those

inadmissible to show his membership. *See United States* v. *Costello,* 352 F.2d 848, 853-55 (2d Cir. 1965), *rev'd on other grounds sub nom. Marchetti* v. *United States,* 390 U.S. 39 (1968); *United States* v. *Annunziato,* 293 F.2d 373, 376-77 (2d Cir.), *cert. denied,* 368 U.S. 919 (1961); *Shapiro* v. *United States,* 166 F.2d 240, 242 (2d Cir.), *cert. denied,* 334 U.S. 859 (1948); *see also* Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae,* 31 Yale L.J. 229, 236 (1922).

Burdieri's declarations that the price was $12,500 for one-half a kilo and $25,000 for a kilo help to explain his conduct in riding around in McElroy's car counting the money before he left for 36th Street and Third Avenue, as relating to the very transaction at issue; they give that conduct legal significance and they accompanied it. *See* cases cited in 6 Wigmore, *supra,* § 1777, at 204 n. 9; *Terry* v. *United States,* 51 F.2d 49 (4th Cir. 1931).[2] From the previous transaction in which D'Amato, Zito and Burdieri were involved, together with the verbal acts of Burdieri in the negotiations for the sale of heroin, it may fairly have been inferred that there was on March 27, 1973, a conspiracy the object of which was the sale of heroin. On this point, certainly the Government was entitled to prove

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[2] Burdieri's intent with respect to the meeting of March 27 is relevant to whether a general conspiracy involving narcotics existed as charged. The Supreme Court, in a broadly worded opinion by Mr. Justice Gray, stated:

> The existence of a particular intention in a certain person at a certain time being a material fact to be proved, evidence that he expressed that intention at that time is as direct evidence of the fact, as his own testimony that he then had that intention would be. After his death there can hardly be any other way of proving it.

Mutual Life Insurance Co. v. *Hillmon,* 145 U.S. 285, 295 (1892). *See also Insurance Co.* v. *Mosley,* 75 U.S. (8 Wall.) 397, 404-05 (1869).

that Burdieri and McElroy were engaged in a transaction involving the sale and purchase of heroin which Burdieri was to obtain from someone and/or some place other than at 23rd Street and Second Avenue. Thus considered, that portion of his utterances to McElroy limited to establishing that a sale of heroin was to take place that evening may be considered as an item of circumstantial evidence in determining whether the preponderance test was met as to Abramo's membership in the conspiracy, even while Burdieri's declaration that he was going to meet "his people" was for purposes of that determination inadmissible hearsay. Given the existence of a conspiracy to sell heroin in which Burdieri was a participant, we must try then, in measuring the role of Abramo, "to perform the intellectual feat of assessing the independent evidence free from the color shed upon it by the hearsay" [as to Abramo being one of Burdieri's "people"]. *United States* v. *Geaney,* 417 F.2d at 1120. Assessing the evidence, we cannot say that it is insufficient to establish Abramo's participation by a fair preponderance, once we draw reasonable inferences from it, as the jury was entitled to do.[3]

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[3] The Government argues that "The conspiracy charged here was one among Burdieri, D'Amato, Abramo and Zito to sell heroin generally, not only to sell it to McElroy." Brief at 22 n.*. Under *United States* v. *Geaney, supra,* we are to look at *all* of the independent evidence, not just the independent evidence related to the allegedly aborted transaction of March 27. The Government urges not that there was any evidence to tie Abramo to the February 20 sale, the substantive charge having been dismissed as to Abramo, but that the February 20 transaction is independent evidence of Abramo's participation in a general conspiracy because of the similarities in the *modus operandi* of the transactions of that date and March 27. The suggestion is that, since Zito supplied the automobile and was the driver at the February 20 "transaction," then "Judge Cannella was entitled to infer that Abramo was not merely an innocent chauffeur." Government Brief at 18. We need not decide whether the similarities between the two "transactions" were alone sufficient to create a fair preponderance of evidence to establish Abramo's membership in the conspiracy in light of our decision above.

From the circumstances it can be inferred that the March 27th meeting at the 36th Street and Third Avenue coffee shop between Burdieri—fresh from his $28,000 drive with Agent McElroy and well surveilled taxi drive up from 23rd Street and Second Avenue—and Abramo and D'Amato was not only prearranged but designed to permit counter-surveillance by them of anyone following Burdieri. These circumstances include the fact that Abramo drove slowly down 36th Street and stopped just as Burdieri came into sight, that Burdieri left the coffee shop when D'Amato and Abramo pulled up, and that D'Amato and Abramo left the car at exactly 9:00 p.m. That the meeting was prearranged pursuant to a plan to which Abramo was a party is evident. Whether the plan was conspiratorial in nature, however, is another question. On balance we think that the jury may properly have been permitted to answer in the affirmative, drawing the inference first from the fact that the meeting was so arranged that Abramo and D'Amato could observe whether Burdieri was being followed by way of his going into the coffee shop first rather than waiting on the corner, and, second, from the evasive automobile action taken subsequently. One does not intentionally square blocks in mid-Manhattan traffic, stop and then accelerate several times, swerve across three lanes at 75 m.p.h. to take an expressway exit and square large areas in Queens unless he is trying to determine whether he is being followed or, having ascertained that, trying to avoid being followed.

Abramo argues that he was merely attempting to "extricate" himself from "suspicious circumstances," and that he therefore cannot be said to be a member of the conspiracy, relying on *United States* v. *Kearse*, 444 F.2d 62, 64 (2d Cir. 1971), and *United States* v. *Euphemia*, 261 F.2d 441 (2d Cir. 1958). But, absent Abramo's participation in the conspiracy and knowledge of its object, what could have been the "suspicious circumstances" to which this

argument refers? Rather than try to "extricate" himself, indeed it would seem that driving his own wife's car, coming to a prearranged meeting with Burdieri under the circumstances described, and leaving in his auto so as to attempt to avoid or evade surveillance would be consistent only with his membership. Had he innocently thought D'Amato and Burdieri to be involved in a narcotics or other suspicious transaction from which he wished to be disengaged, his conduct in giving them a ride together would hardly have occurred. In short, we believe that the independent evidence, coupled with the proof (through Burdieri's verbal acts) of the existence of a conspiracy to sell heroin on March 27, is sufficient to establish Abramo's participation in the conspiracy. Once this is true, of course, at least some of Burdieri's statements, such as that he was going to meet "his people," are evidence admissible inferentially against Abramo also.

II. THE CONFRONTATION QUESTIONS.

A. *The Burdieri Statements.* In this case, Burdieri was not even theoretically available as a witness for either the Government or the defendants. Appellants, relying on the court's decision in *United States* v. *Puco,* 476 F.2d 1099, *rehearing and petition for rehearing en banc denied,* 476 F.2d 1106 (2d Cir. 1973), contend that Burdieri's statements did not bear sufficient indicia of reliability to make them admissible. The Government counters that such a separate finding is either never required where the admitted testimony was in furtherance of a conspiracy, relying on the dissenting opinions in *Puco,* or, in the alternative, that the statements here did bear sufficient indicia of reliability to make them admissible.

It seems clear that virtually all of the extrajudicial statements of Burdieri were not only in furtherance of the conspiracy (of which he was indisputably a member) but were also against his own penal interest. As pointed out in the opinion of Judge Feinberg in the *Puco* panel's denial of a rehearing, assessing the impact of *Dutton* v. *Evans*, 400 U.S. 74 (1970), on the well-established co-conspirator exception to the hearsay rule is a straightforward task where, as here, the extrajudicial statements were decidedly against the penal interests of the speaker when made. *United States* v. *Puco*, 476 F.2d at 1107, *citing United States* v. *Weber*, 437 F.2d 327, 340 (3d Cir. 1970), *cert. denied*, 402 U.S. 932 (1971).[4]

B. *The Paid Informant.* Appellants contend that the court below abused its discretion in refusing to compel the Government to reveal the name of the paid informant who introduced McElroy to Burdieri and who was present at some meetings with them. A reading of the record convinces us, as it did the court below, that the assertion by appellants that this paid informant was "intricately involved in the transaction of this case," Brief for Abramo at 35, is insupportable. The trial court also quite properly took into account the manner in which Burdieri himself met his demise, note 1 *supra*. Under *United States* v. *Soles*, 482 F.2d 105, 108-10 (2d Cir. 1973), we find no abuse of discretion. Appellants' argument that the paid informant could have been called and, if called, might have cast doubt on McElroy's rendition of Burdieri's statements is pure speculation. On the facts before the district court, there

[4] Appellants' other contentions with respect to the admission of certain statements made by Burdieri are without merit. We agree with the trial judge, for example, that the "Vinnie Pappa" statement was clearly relevant, was not "brutally prejudicial," and, again, was made in plain furtherance of the conspiracy.

was no need that a hearing be held to probe into what the paid informant might or might not have testified to.

III. THE CLAUSTROPHOBIC JUROR.

After verdicts had been returned as to all appellants on all counts except with respect to Zito on count two, it was determined by the court that one of the jurors was unable to continue. The juror had in fact previously experienced some discomfort, and indeed had been sent to a hospital where the problem was diagnosed as an acute attack of claustrophobia. The court had, however, taken steps to alleviate the strain on the juror; and when the point was reached that the juror could not continue further, a full and most careful examination of that juror and the jury by the court, App. 735a-68a, made it abundantly clear that the claustrophobia had not "adversely affected the challenged juror's ability to decide [the] case intelligently." *United States* v. *Silverman*, 449 F.2d 1341, 1344 (2d Cir. 1971), *cert. denied*, 405 U.S. 918 (1972), at least with respect to the verdicts already returned. There was therefore no prejudice to any defendants on those counts. Appellant Zito argues on appeal, citing no authority, that the failure of the jury to return a verdict as to him on count two required dismissal of that count rather than a mistrial as directed by the court below. But appellant Abramo's brief correctly states the law, which is that a new trial—following the declaration of a mistrial—is the appropriate outcome where a juror has been disqualified. *See Parker* v. *Gladden*, 385 U.S. 363 (1966); *United States* v. *Rattenni*, 480 F.2d 195 (2d Cir. 1973).

For reasons herein stated, the judgments with respect to appellants are affirmed.

APPENDIX B

Constitutional and Statutory Provisions Involved

United States Constitution:

Fifth Amendment

"No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

Sixth Amendment

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence."

United States Code:

21 U.S.C. § 841

"(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

"(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance;

* * * * *

"(b) Except as otherwise provided in § 845 of this Title, any person who violates subsection (a) of this section shall be sentenced as follows:

"(1) (A) in the case of a controlled substance in Schedule I or II which is a narcotic drug, such person shall be sentenced to a term of imprisonment of not more than fifteen years, a fine of not more than $25,000, or both. * * * Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a special parole term of at least three years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least six years in addition to such term of imprisonment." *Pub. L. 91-513, Title II, § 401, October 27, 1970, 84 Stat. 1260.*

* * * * *

21 U.S.C. § 846

"Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the subject of the attempt or conspiracy." *Pub. L. 91-513, Title II, § 406, October 27, 1970, 84 Stat. 1265.*

28 U.S.C. § 1865—Qualifications for Jury Service

"(a) The chief judge of the district court, or such other district court judge as the plan may provide, on his initiative or upon recommendation of the clerk or jury commission, shall determine solely on the basis of information provided on the juror qualification form and other contempt evidence whether a person is unqualified for, or exempt, or to be excused from jury service. The clerk shall enter such determination in the space provided on the juror qualification form and the alphabetical list of names drawn

from the master jury wheel. If a person did not appear in response to a summons, such fact shall be noted on said list.

"(b) In making such determination the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand and petit juries in the district court unless he—

"(1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;

"(2) is unable to read, write, and understand the English language with a degree of proficiency sufficient to fill out satisfactorily the juror qualification form;

"(3) is unable to speak the English language;

"(4) is incapable, by reason of mental or physical infirmity, to render satisfactory jury service; or

"(5) has a charge pending against him for the commission of, or has been convicted in a State or Federal court of record of, a crime punishable by imprisonment for more than one year and his civil rights have not been restored by pardon or amnesty." *As amended Mar. 27, 1968, Pub. L. 90-274, § 101, 82 Stat. 58; Apr. 6, 1972, Pub. L. 92-269, § 1, 86 Stat. 117.*